

Service Date: June 10, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Application)	UTILITY DIVISION
of GIGLIOTTI GROUP, INC. dba KADCOM)	
and U S WEST Communications, Inc., Pursuant)	DOCKET NO. D97.3.50
to Section 252(e) of the Telecommunications Act)	
of 1996 for Approval of their Resale Agreement.)	ORDER NO. 5983

FINAL ORDER

Introduction and Procedural Background

1. The Telecommunications Act of 1996 (1996 Act)¹ sets out methods by which local competition may be encouraged in local exchange markets which historically have been monopolistic. One of the paths to a competitive local exchange market set forth in the 1996 Act is resale of services. *See* 47 U.S.C. §§ 251(b)(1) and (c)(4). Parties can voluntarily negotiate agreements for resale or they may request state commissions to mediate or arbitrate unresolved issues. 47 U.S.C. § 252. Once agreement is reached voluntarily or by arbitrating, the parties to the agreement must submit it to the appropriate state commission for approval. 47 U.S.C. § 252(e).

2. U S WEST Communications, Inc. (U S WEST) entered into an interconnection agreement with Gigliotti Group, Inc. dba KADCOM (KADCOM) for resale of U S WEST services according to the 1996 Act. U S WEST filed the parties' agreement, entitled "Agreement for Service Resale" (Agreement) with the Montana Public Service Commission (Commission) on March 25, 1997. The Agreement was docketed as D97.3.50 and it provides for KADCOM to resell U S WEST's local exchange services in Montana, Oregon and Wyoming, "and such additional states as the Parties may mutually agree upon."

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

3. The Commission issued a Notice of Commission Action on Applications for Approval of Interconnection Agreement and Notice of Opportunity to Intervene and Comment on April 15, 1997, giving public notice of the requirements that the Commission approval of the filings be nondiscriminatory toward other telecommunications carriers not parties to the agreement and be consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by May 5, 1997. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than May 16, 1997.

4. No hearing has been requested and no comments received in regard to the KADCOM Agreement. The KADCOM Agreement is substantially identical to the previously approved resale agreements between U S WEST and Montana Communications and U S WEST and Citizens Telecommunications Company, approved by the Commission on February 10, 1997 in Order No. 5962a, and the agreements between U S WEST and Max-Tel Communications, Inc. and U S WEST and ADCOM, LLP, approved by the Commission on April 29, 1997 in Order No. 5980. In Order No. 5962a, because no prefiled testimony was filed and no data requests were issued according to the procedural schedule, and the substantive filings consisted of nothing more than the agreements of the parties, the Commission vacated the hearing pursuant to the parties' requests, and agreed to consider the matter on submitted briefs. Briefs were filed by U S WEST and Citizens only, urging approval of the agreements as negotiated.

5. The parties' agreements in the Citizens and Montana Communications consolidated approval proceeding, Docket No. D96.11.191, included a clause which would not permit either party to transfer a customer between them when the customer has an account in arrears. The Commission requested additional information from the parties addressing its concerns about this contract clause, and after reviewing the parties' responses relating to these concerns, the Commission voted to reject the clause and approve the remainder of the agreements. The AMCOM and Max-Tel agreements contained the same clause--rejected by this Commission in Order No. 5962a -- in section IV.C.2 on page seven of each agreement. The KADCOM Agreement contains the clause on page seven in section IV.C.2 as well.

Applicable Law and Commission Decision

6. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

7. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by June 23, 1997, 90 days following the submission of the KADCOM Agreement for Commission approval.

8. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

9. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the state commission's authority is preserved in § 252 (e)(3) to establish or enforce other requirements of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

10. No comments have been received that express any reservations about the parties' agreement not complying with federal law as cited above or with state telecommunications requirements. The Montana Consumer Counsel, who represents the consumers of the State of Montana, intervened in the first approval proceeding, but did not point to any portions of the similar Citizens and Montana Communications agreements that he believed are not consistent with the public interest, convenience and necessity.

11. Nonetheless, following an initial review of the Citizens and Montana Communications agreements in the first approval proceeding, the Commission expressed concern and asked for input from the parties regarding the following contract clause included in both agreements at page 7:

The Parties agree that they will not transfer their respective end user customers whose accounts are in arrears between each other. The Parties further agree that they work cooperatively together to develop the standards and processes applicable to the transfer of such accounts.

Section IV.C.2. The Commission requested that the parties respond to its concern that this clause is not consistent with the public interest, convenience and necessity as required by 47 U.S.C. § 252(e)(2)(A)(ii). The Commission indicated its concern that the customer's ability to change local exchange providers may be improperly and unreasonably restricted by this contract term, noting that there is no explanation of what is meant by "in arrears," there may be impermissible privacy violations resulting from this term, and that it might be an anticompetitive or an unfair trade practice.

12. In the prior approval proceeding, Citizens and U S WEST filed a joint response to the Commission's request, stating their belief that the language is a necessary part of their agreement, attempting to address potential problems with unscrupulous customers who switch providers to avoid having to pay the existing provider's bill. They further stated:

Once a customer switches providers, it will be very difficult for the old provider to collect the unpaid bill. Additionally, a customer leaving behind an unpaid bill is a very high risk customer for the new provider. The parties have not yet been able to design an optimal system which will prevent abuses by the customer while minimizing the amount of actual credit information that is

exchanged. That is why the second sentence of the language . . . requires the parties to continue working together to develop standards and processes applicable to the transfer of such accounts.

As a reasonable interim measure, the parties agree that the current provider will not transfer a customer if that customer is in arrears. For example, if USWC refuses to transfer a customer to CTC, CTC will know that the customer needs to resolve a bill in arrears, without knowing any of the details of the customer's credit history.

In the case of both USWC and CTC, arrears means the customer is in the late stages of a progressive effort to collect on a bad debt.

U S WEST and Citizens contended that the provision promotes the public interest by enabling carriers to have some means to protect their ability to collect bad debt, thereby preserving the financial health of the parties and keeping rates low for all subscribers by reducing the cost of unpaid debt which ultimately would have to be absorbed by them. They state that it also provides a means to discourage bad faith actions of customers who switch carriers to avoid payment.

13. Montana Communications owner, David Wick, also responded to the Commission's request in the first approval proceeding, stating that the transfer of information relating to customers whose accounts are in arrears is a positive approach to addressing fraud in the competitive market. Mr. Wick stated that, "This is not for the exclusion of any individual requesting service, but rather to help in determining deposit amounts and duration of holding deposits." Mr. Wick echoed some of the same concerns as U S WEST and Citizens, noting that there is a higher potential for the consumer to abuse the system in the competitive environment. Although this relates to only a small percent of the consumer base, according to Mr. Wick, resale margins are so small to start with and the exchange of basic information is only a means for managing potential losses.

14. In Order No. 5962a, we stated that, "the Commission is sympathetic to the concerns expressed by the parties and recognizes that the competitive local exchange market will likely create opportunities for customers to obtain services from alternate providers even though they may have delinquent accounts with a competitor." The Commission also noted that this will be a change for the incumbent LEC which has been the only provider of telecommunications service in the past and which still has near total market power, particularly in rural states like

Montana. The Commission added that the incumbent's credit records will not be complete and it may have to develop new methods to screen new customers, although it will have the benefit of its database records in the case of a reseller to show that service has been recently disconnected at a particular address, which might help to prevent unscrupulous actions by consumers. Finally, we noted that in the short term, the incumbent LEC's existing credit records should be reliable and useful for this purpose.

15. In Montana, regulated telecommunications providers such as U S WEST must provide service to all customers if they meet certain conditions set forth in Commission regulations (the carrier of last resort obligation). In certain instances, U S WEST may request and obtain advance payments, deposits, or other credit guarantees. Resellers are not subject to these credit regulations and they may take steps they deem necessary to prevent uncollectible accounts. As an example, resellers may rely on consumer credit reporting agencies, while the regulated incumbent may not use such reports for serving its residential customers.

16. The Commission expressed its concern for consumer privacy in the first approval proceeding. Sharing credit information without the knowledge and consent of the customer involved violates the customer's reasonable expectations of privacy and should not be permitted unless there is a compelling reason for such an invasion. In Order No. 5962a, the Commission noted that the parties had not demonstrated that such a compelling reason exists and that other means of limiting potential losses are unreasonable, or that they may be substantially harmed if they are not permitted to exchange consumer information between them. The Commission further noted that telecommunications providers in the long distance segment of the industry have not been able to engage in the sort of exchange of information which may be permissible under the above-quoted provision. Most importantly, we stated that the privacy rights of consumers and their ability to choose a supplier of telecommunications services may not be trumped by the parties' concerns for uncollectible accounts.

17. Order No. 5962a also stated that the proposed term would also increase the opportunity for engaging in anticompetitive activity. Specifically, an account that is "in arrears" may be a valued customer who routinely pays bills a little late and has been permitted to do so by the provider. Although the parties stated in their response that this means that a customer is in

the last states of a progressive effort to collect on a bad debt, that is not what it says, and in interpreting contract terms, the plain meaning of words used generally prevails. Webster's Ninth New Collegiate Dictionary (1988) defines arrears as "the state of being behind in the discharge of obligations." The Commission finds this term vague and overbroad, with the potential of unreasonably restricting consumer choice as the competitive market develops. Thus, it is not in the public interest.

18. A further concern is the incumbent LEC's obligation as a carrier of last resort. The incumbent LEC may be required to provide service according to the Commission's regulations, notwithstanding the existence of an account in arrears with another carrier. *See* ARM 38.5.1101, *et seq.* Section 252(e)(3) of the 1996 Act clearly permits the Commission to require regulated incumbents to provide service to residential consumers, notwithstanding other credit problems the consumer may have. *See* ARM 38.5.1104.

19. The Commission finds that the remainder of the terms in the parties' agreements appear to conform to the standards required by the Act. There have been no objections raised that the agreements otherwise discriminate improperly or are not consistent with the public interest, convenience and necessity. According to § 252(e)(2)(A)(ii) of the 1996 Act, the Commission may reject an agreement or a portion of an agreement if it is not consistent with the public interest. Although the clause discussed above is found to be inconsistent with the public interest, and is therefore rejected, the entire agreement need not be rejected. Rejection of the entire agreement is not appropriate when the objectionable term has no direct effect on the remainder of the agreement. Except as explained in the following paragraph, the remainder of the KADCOM Agreement should be approved.

20. The Agreement include a statement in the first paragraph that should also be corrected to comply with Montana law. KADCOM is expressly referred to as a "Certified Reseller." According to recently enacted legislation in Montana, KADCOM appropriately may be referred to as a "registered reseller if it has registered with the Commission," but Montana law does not provide for certification of telecommunications providers. This reference and any others in the agreement should be corrected to properly reflect Montana law.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. KADCOM intends to resell telecommunications services in U S WEST territories throughout Montana. Section 69-3-804, MCA (1995), has previously provided an exemption from Commission regulation for resellers. Senate Bill 89, passed by the 1997 Montana Legislature and signed into law by the Governor of Montana on April 22, 1997, removes the exemption from regulation in Montana for resellers of regulated telecommunications services. As a reseller of regulated telecommunications services in Montana, KADCOM will be subject to Commission authority to supervise, regulate and control public utilities. Before providing services in Montana, KADCOM initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission. Montana law does not provide a process for certification or licensing of telecommunications providers and KADCOM is not a "certified reseller" in Montana.

3. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934*, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to § 252(e)(2)(A). Section 69-3-103, MCA.

7. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the KADCOM Agreement by June 23, 1997, or the Agreement will be deemed approved.

8. The Commission may reject a portion of a negotiated agreement and approve the remainder of the agreement if such action is consistent with the public interest, convenience and necessity and does not discriminate against a carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A).

Order

THEREFORE, based upon the foregoing, it is ORDERED

1. that the resale agreement of the parties, submitted to this Commission for approval pursuant to the 1996 Act, includes a contract term which is not consistent with the public interest and which is rejected as explained above; and

2. with the exclusion of the rejected contract term, the resale agreements are approved.

It is further ORDERED that any reference to certification of KADCOM be corrected to comply with Montana law.

DONE AND DATED this 28th day of May, 1997, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.